

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**IN RE: REALPAGE, INC., RENTAL
SOFTWARE ANTITRUST LITIGATION
(NO. II)**

**Case No. 3:23-MD-3071
MDL No. 3071**

**This Document Relates to:
ALL CASES**

Chief Judge Waverly D. Crenshaw, Jr.

Hearing:

Date: May 31, 2023
Time: 1:30 p.m.
Place: Courtroom 6D
Fred D. Thompson
United States Courthouse
719 Church Street
Nashville, TN 37203

JOINT STATEMENT ON CASE PROGRESSION AND SCHEDULING

In accordance with the Court's April 19, 2023 Order (ECF No. 3), counsel for the undersigned plaintiffs and defendants conferred and submit the following Joint Statement on Case Progression and Scheduling.

A. CRITICAL FACTUAL ALLEGATIONS

Plaintiffs' Position:

Plaintiffs¹ allege that Defendants conspired to maintain, raise, and fix multifamily and student rental housing prices across the United States. Plaintiffs allege that lessors of multifamily

¹ Here, "Plaintiffs" refers to the lessees of multifamily properties ("Multifamily Rental Plaintiffs") and the lessees of student housing ("Student Rental Plaintiffs"). All putative classes allege that their respective defendants used RealPage's services to inflate housing prices – but the Student Rental Plaintiffs' complaint involves a separate market and includes non-overlapping defendants.

and student real estate leases (“Lessor Defendants”) agreed to use a common third party—Defendant RealPage, Inc. (“RealPage”), and its software, including RealPage’s “AI Revenue Management” suite (previously known as “YieldStar”)—to coordinate unit-specific rental prices and supply decisions.

Plaintiffs allege that Defendants acted in furtherance of their conspiracy by, among other things: sharing the Lessor Defendants’ proprietary pricing, inventory, and vacancy data with other participants in the conspiracy through RealPage, via email, over the phone, and in-person; mutually agreeing to adhere to the prices and lease terms in accordance with the recommendations of RealPage’s software; and agreeing to allow RealPage to monitor whether each Lessor Defendant was complying with the pricing and lease term recommendations.

As a result of Defendants’ illegal actions, Plaintiffs allege that they, and the class members they propose to represent, were harmed by paying higher rents than they otherwise would have in a competitive market.

Defendants’ Position:

RealPage is a technology company that provides software solutions that help its customers—owners and managers of multifamily housing and other types of rental properties—manage their assets. The Lessor Defendants are owners or managers of rental properties who allegedly use (or used) one of RealPage’s software products.

One category of products that RealPage offers is revenue management software. Revenue management software is not unique to RealPage or to the real estate industry. RealPage offers different revenue management products that function differently, but at a high level each product analyzes data and helps customers make accurate and precise investment decisions. The functionality of these products includes, among others, pricing suggestions for a customer’s units

based on the individual asset strategy a customer adopts for its rental property and that property's individual circumstances, including forecasted supply and demand for the customer's own units. RealPage customers might or might not accept these suggestions in their own individual discretion—each customer always controls its decision-making about the price for each of its units either independently or in compliance with applicable rent control laws.

Defendants deny Plaintiffs' allegations regarding a conspiratorial agreement to maintain, raise, and fix multifamily real estate lease prices. Likewise, the subset of Defendants who have been named in the student rental housing complaint deny Plaintiffs' allegations regarding a conspiratorial agreement to maintain, raise, and fix student rental housing prices. Defendants did not agree with each other to use RealPage software, nor did they agree with each other on unit prices or supply decisions, to adhere to RealPage's suggested prices, or to allow RealPage to monitor compliance with the price-fixing agreement Plaintiffs allege. Defendants contend that their individual adoption and use of RealPage's revenue management software (for those who utilized it) was lawful and independent. Defendants deny that such conduct has harmed competition or consumers.

Anticipating that Plaintiffs' Consolidated Amended Complaints will be deficient under Federal Rule of Civil Procedure 12 for at least the same reasons the current complaints are deficient, Defendants expect to file motions to dismiss for failure to state a claim, among other potential grounds for dismissal. Defendants also intend to file motions to compel arbitration concurrently with or in advance of Defendants' anticipated motions to dismiss pursuant to applicable arbitration agreements.

B. LEGAL ISSUES

Issues Resolved:

- a. Venue.

Issues Still in Dispute:

- a. Whether Plaintiffs have plausibly alleged, and can prove, a contract, combination, or conspiracy among the Defendants that violates Section 1 of the Sherman Act;
- b. Whether Plaintiffs have plausibly alleged, and can prove, any claims brought under state law;
- c. Whether each Defendant named in the Multifamily Rental Plaintiffs' complaints agreed to participate in the alleged conspiracy to maintain, raise, and fix multifamily real estate lease prices and/or suppress supply of multifamily real estate leases;
- d. Whether each Defendant named in the Student Rental Plaintiffs' complaint agreed to maintain, raise, and fix student rental housing prices and/or suppress supply of student housing;
- e. Whether the Defendants named in the Multifamily Rental Plaintiffs' complaints, or any of them, acted in furtherance of the alleged conspiracy to maintain, raise, and fix multifamily real estate lease prices and/or suppress supply of multifamily real estate leases;
- f. Whether the Defendants named in the Student Rental Plaintiffs' complaint, or any of them, acted in furtherance of the alleged conspiracy to maintain, raise, and fix student rental housing prices and/or suppress supply of student housing;

- g. Whether the *per se* rule, quick look rule, or the rule of reason is applicable to Plaintiffs' claims;
- h. To the extent any market analysis is required, whether Plaintiffs have plausibly alleged, and can demonstrate, adverse effects on competition in any plausible relevant market;
- i. To the extent any market analysis is required, whether Plaintiffs have plausibly alleged, and can prove, proper geographic and product markets for antitrust purposes;
- j. To the extent any market analysis is required, whether Plaintiffs have plausibly alleged, and can prove, market power in those markets;
- k. Whether Plaintiffs have plausibly alleged, and can prove, that they have suffered causal antitrust injury from the purported anticompetitive conduct;
- l. Whether Plaintiffs can establish damages caused by the alleged antitrust violations and the measure of such damages;
- m. Whether Plaintiffs are entitled to injunctive and equitable relief;
- n. Whether Plaintiffs and the proposed Class(es) satisfy the requirements of Federal Rule of Civil Procedure 23;
- o. Whether Plaintiffs' claims are time-barred in whole or in part;
- p. Whether certain Plaintiffs and certain putative Class members are precluded from proceeding under binding arbitration agreements;
- q. Whether certain Plaintiffs and certain putative Class members are precluded from proceeding under binding class action waivers; and

- r. Whether any other affirmative defense bars Plaintiffs from recovering, in whole or in part.

C. CLAIMS AND DEFENSES

Plaintiffs' Claims:

Plaintiffs claim that Defendants entered into a formal or informal contract, combination, conspiracy, or common understanding to artificially inflate price and/or suppress supply of multifamily real estate leases and student housing, in violation of the Sherman Act, 15 U.S.C. §1 *et seq.* and various state antitrust and consumer protection statutes.

Defendants' Defenses:

Subject to the allegations in the forthcoming Consolidated Amended Complaints, Defendants identify the following non-exhaustive list of defenses:

- a. Dismissal for failure to state a claim for which relief can be granted;
- b. Defendants did not enter into any unlawful agreement with RealPage or other Defendants;
- c. Defendants' conduct was procompetitive;
- d. Where a Defendant utilized RealPage revenue management software, it did so in its independent, economic self-interest;
- e. Lack of anticompetitive effects in any relevant market;
- f. Lack of market power in any relevant market;
- g. Lack of support for a relevant antitrust market in which to assess the alleged conduct;
- h. Failure to comply with Rule 23 regarding class actions;
- i. Plaintiffs are subject to binding arbitration agreements;

- j. Plaintiffs are subject to binding class action waivers;
- k. Statute of limitations;
- l. Laches, waiver, or estoppel;
- m. Due process;
- n. Double or duplicative recovery;
- o. Lack of standing;
- p. Lack of antitrust injury;
- q. Jury trial waiver; and
- r. Damages limitations.

D. INITIAL MEDIATION PLAN, INCLUDING PROPOSED MEDIATOR AND TIMING FOR MEDIATION

Plaintiffs' Position

Plaintiffs believe that no mediation will be effective before the appointment of “Interim Multifamily Rental Class Counsel” for the proposed class(es) of lessees of multifamily properties and of “Interim Student Rental Class Counsel” for the proposed class of lessees of student housing per the Court’s April 19, 2023 Order. ECF No. 3, ¶6. To the extent that Defendants have made a proposal regarding timing of mediation in this Status Report, Plaintiffs do not take a position on that proposal and instead suggest that the Court order the Parties to discuss dates for ADR attempts after Interim Class Counsel for the Classes has been appointed, as further discussed in §F below.

As described in §F below, following the appointment of Interim Class Counsel for the Classes, Interim Class Counsel for the Classes and counsel for Defendants in the Centralized Actions shall conference in accordance with Federal Rule of Civil Procedure 26(f). Plaintiffs believe such a conference should occur expediently to begin the process of setting a discovery schedule and streamlining the discovery process, as the Federal Rules intend. At that conference,

the Parties shall discuss an initial plan for ADR, including a proposed mediator and timing for mediation. The Parties shall inform the Court of the results of that conference, and the parties' initial mediation plan, including the proposed mediator(s) and the timing for mediation once it occurs.

Defendants' Position:

As discussed in Section F below, Defendants do not agree with the timing of Plaintiffs' proposal regarding the Rule 26(f) conference.

Defendants also believe that, consistent with this Court's preference, the best timing for mediation is (1) within 120 days of the filing of the Consolidated Amended Complaints, and (2) after any motions for summary judgment are filed. Defendants have identified and are investigating the availability and potential candidacy of a number of possible mediators, including: Eric Green, Jeff Mishkin, Faith Hochberg, Kenneth Feinberg, and Greg Lindstrom. Defendants can provide additional details about each of these proposed mediators upon the Court's request.

E. ANY OTHER MATTERS THAT WILL BE HELPFUL TO THE COURT OR EXPEDITE PROGRESSION OF THE CASE

1. Filing of Consolidated Amended Complaints

Within 45 days following the appointment of Interim Class Counsel for the Multifamily Rental and Student Rental classes, each should be required to file a Consolidated Class Action Complaint (respectively the "Consolidated Multifamily Complaint," and the "Consolidated Student Complaint," and collectively, "the "Consolidated Amended Complaints" or "CACs"). Thereafter, the parties should meet and confer regarding the deadlines and lengths of briefing on any motions to dismiss and any motions to compel arbitration, including the number of such motions. The parties should file a stipulation or joint statement on these issues within 21 days of the filing of the CACs.

2. Case Management Conferences

Plaintiffs' Position:

The Parties propose that, once the Court appoints “Interim Multifamily Rental Class Counsel” for the proposed class(es) of lessees of multifamily properties and “Interim Student Rental Class Counsel” for the proposed class of lessees of student housing, it should subsequently hold a case management conference every six weeks.

Defendants' Position:

As detailed in Section F below, Defendants do not agree with the timing or frequency of Plaintiffs’ proposal regarding a case management conference.

F. PROCEDURES THAT WILL FACILITATE THE JUST, SPEEDY, AND INEXPENSIVE RESOLUTION OF THIS LITIGATION

1. Consolidation for Pre-trial Purposes

All cases that have been transferred or conditionally transferred to this District by the JPML or otherwise subject to the JPML’s orders (collectively, the “Centralized Actions”) should be consolidated for pretrial purposes. Any “tag along” action later filed in, removed to, or transferred to this Court, or any related cases filed in the Middle District of Tennessee, should be automatically assigned to Chief Judge Crenshaw, and consolidated with the Centralized Actions without further motions or orders. This consolidation should not constitute a determination that these actions should be consolidated for trial or that a class should be certified, nor does it have the effect of making any entity a party to any action in which it has not been named, served, or added in accordance with the Federal Rules of Civil Procedure. The Parties reserve the right to seek consolidation for trial purposes at a later date.

2. Application of MDL Orders to Newly-Filed and Transferred Cases

All orders entered by the Court in this action should apply to all Centralized Actions unless the Court directs otherwise. The Court's previous orders and any orders hereafter filed on the *In re: RealPage, Inc., Rental Software Antitrust Litigation* docket should apply to related cases later filed in, removed to, or transferred to this Court. Upon transfer to this Court, all preexisting deadlines and orders issued by transferor courts should automatically be vacated.

3. Case Management

Plaintiffs' Position:

Within ten days following the appointment of Interim Class Counsel for the Classes, the Court should order Interim Class Counsel and counsel for Defendants in the Centralized Actions to file a joint letter requesting a subsequent case management conference and provide the Court with dates approximately 21 days after the date for filing the CACs on which counsel is available for that conference. Prior to this subsequent case management conference, the Parties should be ordered to hold a conference pursuant to Federal Rule of Civil Procedure 26(f) and submit a proposed case management order that will address:

1. **Initial Disclosures:** The Parties should be ordered to agree to a date by which to exchange initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) or, absent agreement, to provide the Court with Plaintiffs' and Defendants' position regarding an appropriate date for such exchange.
2. **Case Resolution Plan and Joint ADR Reports:** The Parties should be ordered to make a minimum of two independent, substantive attempts to resolve this case. The Parties should agree on dates for their ADR attempts and agree to file compliant ADR status joint reports. The Parties' joint reports should state the specific steps taken toward

case resolution, including that an offer or demand was made and responded to and that counsel discussed the Parties' positions and specific next steps to promote case resolution. In other words, the Parties must "show their work" in creating a plan to facilitate successful settlement negotiations. The Parties should be allowed to mediate by agreement without the need for further order unless referral for pro bono mediation is requested (which should be made by motion). Any motion for pro bono mediation should include a statement as to why private mediation is not feasible. Any motion for a judicial settlement conference should state: (i) the reasons why mediation is not feasible and why a judicial settlement conference is the preferable means of attempting to resolve the case; (ii) the parties' proposed timing for scheduling of the settlement conference; and (iii) any preference of a particular Magistrate Judge to conduct the settlement conference. The Parties' compliance with this case resolution plan should not be optional. The fact that discovery is ongoing or that a dispositive motion is pending should not relieve the parties of their obligations under this case resolution plan.

3. Discovery: The Parties should be ordered to agree to a discovery plan for this action that will address the items listed in Rule 26(f)(3) and provide dates by which the Parties will: complete all written discovery; depose all fact witnesses; and file any discovery motions.

4. Motions to Amend or Add Parties: The Parties shall agree to a date by which any motions to add parties must be filed. Such motions must comply with Local Rules 7.01 and 15.01. Failure to comply with local rules may result in summary denial of the motion(s).

5. Disclosure of Experts: Prior to the subsequent case management conference, the Parties should be required to propose to the Court a schedule for expert discovery.

6. Electronic Discovery: Prior to the case management conference referenced in this Joint Submission, the Parties anticipate reaching an agreement on how to conduct electronic discovery and submitting an ESI Protocol and [Proposed] Protective Order to the Court.

7. Deadlines for Summary Judgment, Expert Discovery, and Trial: will be determined at a later Case Management Conference.

8. Modification of Case Management Order: Any motion to modify the case management order or any case management deadline should be required to be filed at least seven days in advance of the earliest impacted deadline. Unless a joint motion, the motion for modification should include a statement confirming that counsel for the moving party has discussed the requested modification(s) or extension(s) with opposing counsel and whether there is any objection to the requested modification(s) or extension(s). The motion for modification should also include: (i) the trial date and all deadlines, even unaffected deadlines, so that it will not be necessary for the Court to review one or more previous case management orders in consideration of the motion and (ii) a statement that the requested extension will still conform to the requirements of Local Rule 16.01(h)(1) that no dispositive motion deadline, including response and reply briefs, shall be later than 90 days in advance of the trial date. Motions for extensions should also detail the moving party's efforts at diligently complying with the originally scheduled deadline and the facts

demonstrating good cause for modification of the deadline as required by Fed. R. Civ. P. 16(b)(4).

Plaintiffs do not agree with Defendants' position that a Rule 26(f) conference should be deferred until after any motions to dismiss or compel arbitration. The Parties and the Court will benefit from cooperatively working on discovery issues while such motions are pending, as the Federal Rules contemplate.

Defendants' Position:

While Defendants agree that the parties should participate in a Rule 26(f) conference and submit a proposed case management order to the Court addressing the discovery issues referenced above, Defendants do not agree with Plaintiffs' proposed timing for the conference and proposed case management order. Defendants expect that it may be necessary to stay discovery during the pendency of any motions to dismiss the CACs or motions to compel arbitration. Defendants cannot fully assess this issue until the CACs are filed, however, because the CACs may streamline or otherwise alter the issues in dispute and may remove some currently-named parties, necessarily impacting Defendants' anticipated motions and the potential scope of discovery.

Defendants thus propose that the parties' positions on the timing and length of any motion to stay discovery be included in the joint statement regarding motions to dismiss or compel arbitration (as proposed in Section E.1 above). The time for holding a Rule 26(f) scheduling conference and issuing a Rule 16 scheduling order should be deferred until after resolution of the issues addressed in that joint statement. *See* Rule 16(b)(2) (recognizing the Court can delay issuance of a scheduling order for good cause).

Defendants propose that once the CACs are filed, the parties meet and confer on a stipulation regarding discovery of Electronically Stored Information and a Protective Order.

G. LIST OF PENDING MOTIONS

On May 8, 2023, Plaintiffs' counsel filed their Motion by All Plaintiffs to Establish Deadlines for Submission of Leadership Applications and to Set a Schedule for the Exchange of a Proposed Joint Statement. ECF No. 82. Plaintiffs' motion sought to set a briefing schedule for each proposed leadership slate to file their respective leadership applications. On May 12, 2023, the Court issued an order reserving discussion of Plaintiffs' proposal until the May 31, 2023 Status Conference. ECF No. 91.

No other motions are pending.

H. LIST OF ANY RELATED PENDING STATE AND FEDERAL CASES

Since the Court's April 19 Order, three related cases have been filed:

- *Alexander v. The Irvine Company, LLC et al.*, No. 3:23-cv-00440 (M.D. Tenn.)
- *Blosser v. RealPage, Inc. et al.*, No. 3:23-cv-00445 (M.D. Tenn.)
- *Kempton et al. v. RealPage, Inc., et al.*, No. 3:23-cv-00419 (M.D. Tenn.)

DATED: May 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark P. Chalos, hereby certify that on May 24, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record registered on the CM/ECF system.

DATED this 24th day of May, 2023.

/s/ Mark P. Chalos